

SCHOOLS: Compulsory retirement provision for members of PSRS now effective as WWII has been officially terminated. Board of trustees of PSRS has no duty to restrain member from teaching after attaining compulsory retirement age. Member who has attained compulsory retirement age not eligible for retirement allowance if he continues to teach. Board of trustees should not accept contributions in behalf of member and employer if member continues to teach after automatically retired.

May 29, 1952

6-16-52

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System
State Capitol Building
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"Section 169.060 (1) RSMo 1949 provides as follows:

"'A member who is seventy years of age or more one year after the date the retirement system becomes operative shall be retired as of that date and shall be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service. Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service; provided, however, the compulsory retirement age shall not be effective for the duration of World War II.'

"Under date of January 30, 1952, you wrote an opinion in response to a question from our office which read, 'Will retirement at age seventy as provided for in Section 169.060, RSMo 1949, be compulsory as of July 1, 1952?' The conclusion to your opinion read as follows:

Mr. G. L. Donahoe

"Therefore, it is the opinion of this department that the compulsory retirement provision for members of the Public School Retirement System at age seventy, as provided in Section 169.060, RSMo 1949, will not be effective July 1, 1952, in the absence of an official termination of the war with Japan by appropriate political or governmental action."

"Since your opinion was received on February 5, 1952, it is our understanding that the United States Senate has recommended the ratification of the peace treaty with Japan, and the President has ratified said treaty.

"We wish to request an official opinion which will answer the following:

(1) Has there been appropriate political action taken to terminate the war with Japan and thereby terminate World War II and make the provision for compulsory retirement effective as of July 1, 1952?

(2) If a member teaches in a district included in the Retirement System after reaching the compulsory retirement age, does the Board of Trustees have the duty or responsibility to take action to restrain the member from serving as a teacher?

(3) If a member who has reached the age of seventy teaches on a full-time or part-time basis in a district included in the Retirement System, will he be eligible to receive a retirement allowance during the period in which he teaches?

(4) If a member seventy or more years of age teaches in a district included in the Retirement System, should the Board of Trustees of the Retirement System accept contributions withheld from the salary of the teacher along with matching contributions of the employer and allow the teacher membership service credit because of the services rendered?"

Mr. G. L. Donahoe

You are correct in your statement that since receipt of our previous opinion, written January 30, 1952, the United States Senate has recommended ratification of the peace treaty with Japan and the same has been ratified by the President.

Such being done, we conclude that, in view of the authority cited in our earlier opinion submitted to you, appropriate governmental and political action has been taken to officially terminate the war with Japan and thereby officially terminate World War II insofar as the United States is concerned.

Section 169.060(1), RSMo 1949, provides:

"1. A member who is seventy years of age or more one year after the date the retirement system becomes operative shall be retired as of that date and shall be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service. Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service; provided, however, the compulsory retirement age shall not be effective for the duration of World War II." (Emphasis ours.)

By enactment of the above statute the Legislature undertook to establish a compulsory retirement age of seventy years for members of the Public School Retirement System. However, the operation of the compulsory retirement age provision in its application to retirement of members was withheld for the duration of World War II.

Inasmuch as we have concluded that World War II is now officially terminated, it would therefore follow that the compulsory retirement age as provided in the statute is now effective. Consequently, your first question is answered in the affirmative.

In answering your next three questions a number of statutes will be cited and referred to, and unless otherwise indicated they will be contained in the 1949 Revised Statutes.

Mr. G. L. Donahoe

By the enactment of Sections 169.010 to 169.130, inclusive, the Legislature has created a public school retirement system which includes all school districts within the state with a population of less than 75,000. The membership in said system is largely comprised of public school teachers, and the administration and management of the system is vested in a board of trustees consisting of five persons. It is so provided in Section 169.020.

The Public School Retirement System was created for the purpose of providing retirement allowances and other benefits for public school teachers. Thus Section 169.020(1), in part, reads:

"For the purpose of providing retirement allowances and other benefits for public school teachers, there is hereby created and established a retirement system, which shall be a body corporate, shall be under the management of a board of trustees herein described, and shall be known as 'The Public School Retirement System of Missouri.' * * *"

The funds for the operation of the retirement system are derived from contributions made in equal amounts by the members and their employers. It is so provided in Section 169.030(1), which reads:

"The funds required for the operation of the retirement system created by sections 169.010 to 169.130 shall come from contributions made in equal amounts by members of the system and their employers, and from such interest as may be derived from the investment of any part of such contributions. All contributions shall be transmitted to the board of trustees by employers in such manner and at such times as the board by rule shall require."

The remaining portion of the above statute provides for the amount and manner in which the contributions are to be collected from the members and transmitted to the board of trustees.

Mr. G. L. Donahoe

Section 169.050 declares who are members of the retirement system and provides for membership credits for services rendered. Paragraph 5 of this section provides how membership in the system shall be terminated, and reads as follows:

"5. Membership shall be terminated by failure of a member to be a public school employee under this system for more than four of any five consecutive years, by death, withdrawal of contributions, or retirement based on either age or disability." (Emphasis ours.)

Section 169.070 provides for the amount of retirement allowance to be paid members upon retirement, based in part upon final average salary and creditable service.

As heretofore pointed out, Section 169.060(1) provides for compulsory retirement at age seventy. Paragraphs 2, 3 and 4 of this section provide for voluntary retirement by members at an age less than seventy years and for disability retirement.

It will thus be seen that the Legislature has provided for a complete scheme or method of retiring public school teachers from public school teaching service and for the payment of those so retired a retirement allowance.

Inasmuch as your questions relate to the retirement of members who have reached age seventy, it becomes necessary to further construe Section 169.060(1), supra.

The statute says that a member "shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service."

The word "retire" has been defined as meaning to separate or withdraw from active service. State ex rel. Haberlan v. Love, 95 Nebr. 573, 145 N.W. 1010, 1013. Applying this definition to the language in the statute it would mean that a member shall be automatically withdrawn or separated from active service on the first day of July next following the school year in which he reaches the age of seventy years.

The word "automatically" implies something to be done without option or choice. Thus in the case of Poe v. Penn Mut. Life Ins. Co., 32 F. Supp. 167, the court was construing a life insurance

Mr. G. L. Donahoe

contract requiring the insurer, after the policy had lapsed for nonpayment of premium, to "purchase automatically" for the insured paid-up insurance, using the proceeds of the value of the policy. In declaring the meaning of the phrase "to purchase automatically" the court, at l.c. 168, said:

" * * * The phrase 'to purchase automatically' constitutes an unambiguous requirement that the defendant act 'automatically', that is, without option or choice on its part, in purchasing such insurance with the proceeds of the value of the policy. * * *"

Again paraphrasing the language of the statute, using the above definition of the word "automatically," it would mean that a member of the retirement system upon reaching the age of seventy years in a particular school year shall be withdrawn or separated from active service, without option or choice, on July 1 next following.

The statute further declares age seventy as being the "compulsory" retirement age. In defining the word "compulsory" the Supreme Court of Arizona, in State v. Bradley, 230 P. (2d) 216, 220, said:

" * * * According to standard dictionaries the word compulsory means 'involuntary or forced' in contradistinction to voluntary. * * *"

Under the above definition a member attaining the age of seventy years does not have a choice to voluntarily retire, but his retirement is by law made involuntary and he is forced to withdraw or separate from active service.

In the case of Haag v. City of New York, 222 N.Y.S. 676, the court was considering a New York law creating a retirement system and providing for the retirement of officers and employees of the city of New York. A particular section of the law provided that each member in the city service shall be retired on the first day of the calendar month next succeeding that in which said member shall have attained the age of seventy years. In interpreting the law the court, at l.c. 680, said:

" * * * To my mind it indicates the understanding of the Legislature that the words

Mr. G. L. Donahoe

'shall be retired' mean discontinuance in and incapacity to hold appointive office. There is no other condition from which the officials named could conceivably be excepted. * * *

"Second, the contemporaneous literature which accompanied the passage of these laws points out their dual function, namely: (a) To provide for the support of faithful public officials after they attain the traditional age of 'threescore and ten' (or their intermediate accidental incapacity); and (b) by rendering removal automatic, to relieve the appointing power from the dilemma either of removing the ordinarily superannuated employee, thus leaving him without means of support, or of allowing him to continue in the service out of humanitarian motives to the manifest detriment of the service."

It is logical to presume that our state Legislature, in creating the Public School Retirement System and in providing for the retirement of members thereof, had the same purpose in mind as the court in the above case pointed out with reference to the retirement law which it was considering.

It will thus be seen that by the enactment of Section 169.060(1) the Legislature intended that retirement or withdrawal from active service of a member of the retirement system was to be mandatory upon said member attaining the age of seventy years, and that upon reaching such age a member is by law rendered incapacitated to continue in active teaching service.

Turning now to your second question, it is our thought, in view of what has been heretofore said relative to the mandatory retirement of members of the retirement system reaching age seventy, that the Legislature has clearly intended to prohibit such a condition as you have presented. No exceptions are provided in the law whereby a teacher or member may continue to teach after attaining the compulsory retirement age. Under the provisions of the law as we have construed it such a member is automatically retired from active service and no teaching employment in the public schools should thereafter be undertaken.

Mr. G. L. Donahoe

The powers and duties of the board of trustees are given and imposed under Section 169.020, and more specifically in numbered paragraphs 2, 14, 15, 16 and 17. Nowhere does it appear that the board has the duty to take action to restrain a member from serving as a teacher after he has reached the compulsory retirement age should such member and a school district which might employ him ignore the requirements of the law and enter into a contract of employment.

Insofar as employment of a teacher is concerned, be it before or after the teacher has attained the compulsory age, it is a matter of contractual relationship existing between the teacher and the school district to which the board of trustees is in no way a party.

We might point out that in one instance the board is by statute authorized to take appropriate action by instituting legal proceeding. Under Section 169.030 if an employer fails to transmit contributions to the board as required by law, the board shall institute suit to recover the amounts for which the employer is rendered liable.

Apparently the Legislature never contemplated that a member would continue teaching after reaching the compulsory retirement age or that a school district would undertake to employ such a member, and it apparently did not consider it necessary to invest the board with authority to restrain such teaching by instituting appropriate action as it gave the board authority to institute suit to recover contributions.

In view of the foregoing, your second question is answered in the negative.

As a practical matter it would seem proper, and would be sound procedure to follow, for the board of trustees to give notice of retirement to a member reaching the compulsory retirement age and also to give notice of said retirement to the employer of the member. In giving such notice it would also be proper to request of the member that application be made for retirement allowance.

Now to consider your third question. In connection therewith we are assuming that your reference to full-time employment means that as defined in the rules and regulations promulgated by the Board of Trustees of the Public School Retirement System, and that your reference to part-time employment means regular employment but in a lesser degree than full-time employment.

Section 169.010(10) defines "retirement allowance" as follows:

"(10) 'Retirement allowance' shall mean a monthly payment for life, during retirement."

Mr. G. L. Donahoe

Certainly under the above statute, as well as other provisions of the law, it is the manifest intent and policy of the Legislature that the monthly payment or retirement allowance is only payable to the member after and during actual retirement, which would mean after actual separation from teaching service. In short, if a teacher continues to teach he is not retired as intended by the Legislature, and therefore we do not believe he would be eligible to receive a retirement allowance.

In the case of McBride v. Retirement Board of Allegheny County, 199 A. 130, a mandamus action was instituted to require the payment of a retirement allowance during the time that the plaintiff was employed, after his retirement, by the state of Pennsylvania. Plaintiff had been an employee of the county and had been retired under an act establishing a retirement system for county employees. In considering the question, whether or not re-employment in the same capacity after retirement denies a person his retirement allowance during the period of such employment, the Supreme Court of Pennsylvania said, at l.c. 133:

" * * * Where one has been employed by one of the units of government, has been placed upon the retired list, and is then re-employed by the same political unit, there is much room for argument that he should not be entitled to receive a retirement allowance and compensation on his return to service. These laws must be construed equitably in the interest of the state and the employee. It is evident the retirement act did not intend a different result, and that one re-employed in the same position from which he had retired cannot be considered 'retired.' Nor would he be retired if employed by the same unit of government.
* * *"

Again in People ex rel. Malone v. Mueller, 66 N.E. (2d) 516, the Appellate Court of Illinois was considering whether or not a fireman who had been retired under a pension act could continue to receive his pension upon re-entering active service with the fire department. At l.c. 525 the court said:

" * * * When a fireman has retired, received pension payments and thereafter re-enters the active service of the fire department, he is not a retired fireman within the meaning of the pension act. His pension payments

Mr. G. L. Donahoe

are properly suspended while he is in such active service and receiving the salary of an active fireman. * * *

In view of the foregoing authorities, we take the position that a member of the Public School Retirement System who continues to teach on a full or part-time basis after reaching the compulsory retirement age is not actually retired within the meaning of the law so as to be eligible to receive retirement allowance during the period in which he teaches. In other words, he would be continuing in the same employment from which he was automatically retired. Therefore, your third question is answered in the negative.

Now to proceed to your fourth question.

Under the law the board of trustees, for the purpose of determining membership in the retirement system, must consider a teacher who has reached the compulsory retirement age of seventy years as automatically retired on the basis of age.

As heretofore quoted, Section 169.050(5) provides that "Membership shall be terminated by * * * retirement based on either age or disability."

Relative to transmittal of contributions, Section 169.030(2), in part, reads:

"2. For each school year following the date on which the system becomes operative, each and every employer of one or more persons who are members of the system shall transmit to the board of trustees, before the end of such school year, twice the amount that is deductible from the pay of such employee or employees during the school year. * * *"
(Emphasis ours.)

In reading the above section it is apparent that contributions are to be transmitted to the board only in behalf of members of the system, and it would therefore follow that only contributions for and in behalf of members should be accepted by the board.

Inasmuch as a member who has attained the compulsory retirement age is automatically retired on the basis of age, and therefore terminates his membership in the retirement system, we are of the opinion that any attempted transmittal of purported contributions in behalf of a former member who continues to teach

Mr. G. L. Donahoe

after reaching age seventy should not be accepted. For the same reason a teacher who has reached the compulsory retirement age would not be entitled to membership service credit because of the services rendered after automatic retirement. Consequently, your fourth question is answered in the negative.

CONCLUSION

It is therefore the opinion of this department, in answer to the questions which you have propounded, that:

1. There has been appropriate political and governmental action taken to terminate the war with Japan and thereby terminate World War II so as to make the provision in the law for compulsory retirement for members of the Public School Retirement System effective as of July 1, 1952.
2. The board of trustees of the Public School Retirement System has no duty or responsibility to take legal action to restrain a member from continuing in teaching service after said member has attained the compulsory retirement age.
3. A member who has reached the compulsory retirement age and who is automatically retired will not be eligible to receive retirement allowance during the period in which he may continue to teach, either on a full or part-time basis, after being retired.
4. If a teacher who has reached the compulsory retirement age thereafter continues to teach, the board of trustees of the Public School Retirement System should not accept contributions withheld from the salary of the teacher, together with matching contributions of the employer. Nor should said teacher be allowed membership service credit because of services rendered after automatic retirement.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml